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Creasey Catering, Inc. v. Board of Review, The Industrial Commission of Utah, and Donald M. Steed : Brief of Petitioner

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

CREASEY CATERING, INC.,	)	
Petitioner,	)	NO. 880092-CA
vs.	)	#6
BOARD OF REVIEW, THE INDUSTRIAL COMMISSION OF UTAH, and DONALD M. STEED,	)	
Respondents.	)	

BRIEF OF PETITIONER

Petition for Review from the Board of Review
of The Industrial Commission of Utah,
Unemployment Compensation Appeals

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TERMS AND ABBREVIATIONS USED IN THIS BRIEF

The following terms and abbreviations are used in this brief from time to time:

1. Creasey Catering Company, Creasey Catering, Inc., Petitioner--"Creasey".

2. Donald M. Steed, Claimant, Respondent---"Steed".

3. Administrative Law Judge---"ALJ".

4. Lessee-Drivers, Lessee's, Claimed Independent contractor operator-drivers---"Lessees".

5. Mr. Dee Drollinger---"Drollinger".

6. Mr. Melvin Bowles---"Bowles".

7. Mr. Scott McDermaid---"McDermaid".

8. Mr. Terry Littlefield---"Littlefield".

9. Candy, Sandwiches, Coffee, Drinks, Pastry Cigarettes, and other items sold from the Creasey Catering trucks---"Product".

IN THE UTAH COURT OF APPEALS

CREASEY CATERING, INC., Petitioner, vs. BOARD OF REVIEW, THE INDUSTRIAL COMMISSION OF UTAH, and DONALD M. STEED, Respondents.	No. 880092-CA #6

BRIEF OF PETITIONER

STATEMENT OF JURISDICTION AND NATURE OF PROCEEDINGS BELOW

Jurisdiction of the Court of Appeals is based upon Utah Code Ann 63-46b-16 and Rule 14, Rules of the Utah Court of Appeals.

The Nature of the Proceedings below were that the Respondent, Donald M. Steed, filed an application for unemployment benefits claiming that he had been an employee of Creasey, which application was denied by the Department of Unemployment Security, State of Utah.

Upon appeal by Steed and after a hearing before an Administrative Law Judge, Judge Shonnie B. Passey, Department of Employment Security, the decision denying benefits was sustained and a decision was entered by Administrative Law Judge Kenneth A. Major denying benefits.

Upon appeal to the Board of Review of the Industrial

Commission by Steed, the decision of the Administrative Law Judge was reversed, the Board of Review ruling that Steed was paid a wage and thus was an employee of Creasey and therefore entitled to unemployment benefits. From this decision Creasey timely filed a Petition for Review to the Utah Court of Appeals.

STATEMENT OF ISSUES PRESENTED ON REVIEW

1. Did the Board of Review of the Industrial Commission erroneously interpret or apply the law applicable to when a person is an independent contractor or is an employee under applicable laws of the State of Utah relating to unemployment compensation?

2. Did the Board of Review of the Industrial Commission enter its order reversing the Administrative Law Judge's decision that Steed was an independent contractor, based upon a determination of fact, made or implied by the Board of Review, that is not supported by substantial evidence when viewed in light of the whole record before the board?

STATEMENT OF FACTS

The facts set forth in this section of the brief are general in nature and additional specific facts are cited with references to the record throughout the entire brief.

1. Steed, went to work at Creasey about 1968 in answer to a newspaper ad, (R-85) as a Lessee of a catering

truck, selling food products, (Finding of Fact, ALJ, R-311)

2. He entered into a written lease and License Agreement with Creasey whereby he leased a truck from Creasey and was assigned a route to sell products to customers at various businesses along the assigned route. Under the License Agreement he was permitted to use the name "Creasey Catering" on the side of the leased vehicle. (R-37, Ex-10, Findings of Fact, ALJ 311)

3. This lease was extended and modified from time to time upon agreement of the parties. (R-44, Ex 10)

4. Under these written agreements with Creasey, Steed paid vehicle lease rentals based upon an agreed upon percentage of purchases of product from Creasey, or in the event that Steed purchased product from someone else, the same percentage was paid to Creasey based upon the purchase price paid by Steed to purchase such product from outside sources. (R-98, Findings fo Fact, ALJ, R-312) In 1985 the vehicle lease rentals paid by Steed were $10,744.00. (R-127)

5. Steed could sell the product for such price as he wanted (R-112, as could others. (R-171) He had the right to raise or lower the prices from a suggested price list that Creasey furnished. He had the right to solicit new customers, as did the other vehicle lessees, and did so. (R-162) He had the right, and did in fact, sell on credit to his customers, (R-132) as did other lessees. (R-177) Any losses occasioned by giving credit was borne solely by Steed, (R-133) or the

other Lessees giving credit. (R-178)

6. The method of operation used by Creasey and the Lessees was that the leased truck would be loaded by the Lessees with an inventory of pop, drinks, candy and other non-perishable product the night before, and in the morning the Lessees would purchase perishable sandwiches, cakes, cookies, pastries and other products from Creasey and then service their route. They would drive from business to business, arriving at an approximate scheduled time worked out with the various businesses and sell product to customers who were employees of the various businesses. Customers came out to the truck, which would pull into the parking lot of the business or park out on the street.

7. Steed had at one time as many as 40 stops a day on his route (R-138) which varied from time to time, but he could drop stops if he wanted (R-139), add others (Findings of Fact, ALJ-R-312) and had the right to solicit new business (R-162).

8. The product on the truck was the sole property of the Lessee. (R-131-132, Findings of Fact, ALJ-R-312) In 1985 Steed purchased $80,720.00 in product, which he sold for $98,720 (R-126), evidently electing not to follow Creasey's 37% suggested mark-up which would have generated additional sales income of $11,866.00 than that reported according to his tax return for that year. The risk of loss was that exclusively of the Lessee. Creasey did not take anything

back. (R-132, Findings of Fact ALJ, R-312, 293)

9. Usually at noon the Lessee would telephone Creasey's office and would be advised of the amount of money that he owed for the product that he had picked up the night before and that morning when he returned to Creasey's office in the afternoon, he would pay cash for the product he had purchased. (R-103)

10. Steed, as well as all of the Lessees, (some 45 to 50 in number), (R-96) believed themselves to be independent contractors and in business for themselves. (R-145) They kept and maintained their own books and records, (R-124); paid their own federal social security contributions and workmens compensation insurance (R-56, Ex 10; made their own federal and state income tax payments, (R-125, 161, 175); paid all fuel and oil costs associated with the operation of the leased vehicles, (R-123, 174); owned the product purchased from Creasey and others; had the right to employ their own help (R-56, Ex 10, R-104, 136); decided when they wanted to take days off or vacations; and in so doing employed relief drivers at their own cost and expense (R-104); paid for any damage to the vehicle up to the deductible insurance that was paid by Creasey. (R-134, 135, 144, 311, Findings of Fact, ALJ)

11. Steed, and the other Lessees, could vary their route if they so desired, but usually did not as in doing so they would not be able to serve their regular route

customers. They could, if they wanted to, service special events such as little league baseball games and other events. (R-137, Findings of Fact, ALJ R-312).

SUMMARY OF ARGUMENT

1. The Respondent Steed was not performing services for a wage and therefore was not an employee within the meaning of the Unemployment Compensation Act of Utah.

2. The Board of Review of the Industrial Commission of Utah misapplied the Utah law in determining that the Respondent Steed was an employee within the meaning of the Unemployment Compensation Act of Utah.

ARGUMENT

POINT ONE

THE APPELLATE COURT SHOULD REVIEW THE FINDINGS OF THE BOARD OF REVIEW BUT SHOULD NOT GIVE THOSE FINDINGS ANY UNEQUAL WEIGHT BASED UPON THE FACTS OF THIS CASE

It is conceded that the findings of the Board of Review will be given weight on appeal, but they are subject to judicial review to assure that the findings fall within the "limits of reasonableness and rationality." Gay Hill Field Service v. Board of Review, 750 P.2d 606 (Utah App. 1988); Barney v. Dept. of Employment Sec., 681 P.2d 1273 (Utah 1984). They will be, however, reviewed in a light most favorable to the agency's findings, Wilson v. Industrial Commission, 735 P.2d 403, 405 (Utah App. 1987), if the findings are supported by substantial evidence. Pinter Construction Company

v. Frisby, 678 P.2d 305 (Utah 1984). Reaffirmed in McGuire v. Department of Employment Security, 101 Utah Adv Rep 62 (1989), citing Covington v. Bd of Rev. of Indust. Com'm, 737 P.2d 207 (Utah 1987). Absent such evidence, the findings of the Board should not be afforded any preferential treatment, or be sustained by the appellate court.

As pointed out in Bennett v. Industrial Com'n of Utah, 726 P.2d 427 (Utah 1986):

> "We do not defer to the Commission when construing statutory terms or when applying statutory terms to the facts unless the construction of the statutory language or the application of the law to the facts should be subject to the Commission's expertise gleaned from its accumulated practical, first hand expertise with the subject matter."

The Court then went on and ruled:

> "Whether a worker is an employee within the meaning of the workmen's compensation laws requires the application of a statutory standard to the facts. Since resolution of the issue is not benefited by the Commission expertise or experience, we do not defer to the Commission's ruling."

Thus, under the facts of the case now before the Court, while the Board of Review's decision should be noted, its decision does not merit an unequal weight with respect to the facts and evidence adduced in this matter in spite of the deference given the Employment Security Act by the law. Superior Cablevision v. Industrial Commission, 688 P.2d 444 (Utah 1984).

POINT TWO

THE STATUS OF AN INDIVIDUAL IS DETERMINED UPON THE FACTS OF EACH CASE

It is submitted that each case must stand upon its own merit with respect to the status of individuals being either independent contractors or employees. Truck Insurance Exchange v. Yardley, 556 P.2d 494 (Utah 1976).

POINT THREE

STEED WAS NOT PERFORMING SERVICES FOR WAGES

Before the tests enumerated in Utah Code Ann 35-4-22(j)(5), commonly referred to as the ABC test (now the AB test) are applied, it must be determined under Utah Code Ann 35-4-22(j)(1) that Steed was in fact performing services for wages, or was under any contract of hire written or oral, express or implied. Blamires v. Board of Review, etc, 584 P.2d 889 (Utah 1978); Accord, Superior Cablevision v. Industrial Commission, 688 P.2d 444 (Utah 1984).

It is submitted that the ALJ correctly applied the law in this regard, and it is conceded that the Review Board also deferred in ruling on the applicability of the AB test until after a determination was made as to the question of "wages" being paid, even though its decision took up the AB test applicability first.

The ALJ found that Steed was not performing services for a wage, and therefore he was not an employee within the Unemployment Compensation Act, but upon appeal the Board of

Review found that Steed was working for wages by applying the criteria laid down in Creameries of America v. Industrial Commission, 98 Utah 571, 102 P.2d 300 (1940). The Board of Review failed to properly show the distinctions between Creameries and Fuller Brush Company v. Industrial Commission of Utah, 99 Utah 97, 104 P.2d 201 (1940).

The Board of Review in its decision stated:

> "In the instant case, claimant was permitted to charge a maximum amount for items sold to customers. The claimant could sell the items for less than the maximum price set but he was not permitted to exceed the set price." (R-292)

Again the Board of Review held in its decision at R-295:

> "The maximum retail sales price was fixed by the Company."

It is submitted that the Board of Review could only base such a finding on substantial competent evidence. Covington v. Bd of Rev. of Indus. Com'n, 737 P.2d 207 (Utah 1987).

It reached the conclusion that "wages" were in fact being paid by Creasey because the Lessee could not raise or increase the price of the product being sold. This premise is completely fallacious and erroneous under the facts of this case based upon the testimony of the witnesses who testified before the ALJ. (Findings of Fact, R-312)

The record demonstrates the errors in the Board's

findings.

Steed testified on cross Examination:

> "Q. And is the reverse of that true, sir, if you decided that you wanted to increase the price on a particular product, you could do that?
>
> A. Yes."
>
> (R -134)

Drollinger, a witness called by Steed who also had been a Lessee with Creasey for 13 years (R-155) testified on direct examination:

> "Q. Were you admonished for charging incorrect prices?
>
> A. Several times.
>
> Q. Can you be specific as to dates, places, times events?
>
> A. All during the years that I was there, I was admonished somewhat on--Nothing ever really came out of it, but I was, I was reminded that the prices were high."
>
> (R-157)

On Cross Examination when going over the procedures for hiring a substitute driver, Drollinger testified:

> "Q. All right. Now, did you also tell him (the route supervisor) what to charge your customers, so he'd know what to collect?

The Route supervisor was going to act, for a fee paid by Drollinger, as his substitute driver (R-163).

> A. He was aware of my higher prices and yes,

I told him if your in doubt, just add a nickel to it.

Q. So, as a practical matter, you fixed the prices as to what you were going to get for the product that you were selling?

A. I did, but I was harrassed about that.

Q. Harrassed or not harrassed, you fixed the prices?

A. Yes.

Q. And you collected your price?

A. Yes.

Q. And your profit was the difference between what you bought your product for--

A. Yes.

Q.-- and what you sold it for? and if you wanted to put in a price increase, you put in a price increase?

A. Yes. I did."

(R-164-165)

This extra margin of profit went to the Lessee (R-293) and did not inure to the benefit of Creasey in any way.

Bowles, called as a witness by Creasey, a veteran Lessee with Creasey for over 20 years (R-169), testified with respect to pricing product in excess of that suggested by Creasey:

"Q. Now, you've indicated that you furnished him (Route Supervisor) a price list. Do you change your price list from time to time?

A. Yes.

Q. Increase or decrease what you may charge for a particular product?

A. Yes.

Q. Has Jim Creasey ever told you what to charge or what not to charge?

A. No. It has been suggested, but I've never been told and not particulary harrassed. I don't know, maybe I don't harrass easy.

(R-176)

McDermaid, an in-house employee of Creasey for over 9 years (R-195), and a former Lessee (R-196) testified with respect to pricing: (R-200)

"Q. Have you found on those routes that you have run different prices for the same product?

A. Oh, yes. All the time.

Q. Is that in fact rather common practice?

A. Yes. I've seen marked items crossed out and different prices put on them."

The only evidence adduced in this matter that indicated that Creasey would not permit any charges for product over that set by the company was in the direct testimony of Steed, but upon cross examination he admitted that the product was his to deal with as he saw fit (R-134) and that if he wanted to increase prices he could do it.

He testified: (R-134)

"Q. If you choose to reduce a price on a sandwich in order to get rid of it, I believe you've agreed with me you could do that, is that correct?

A. It'd be your decision, right.

Q. And is the reverse of that true, sir? If you decided that you wanted to increase a price on a particular product, you could do that.

A. Yes."

As the Administrative Law Judge had the opportunity to view the witnesses and the Board of Review did not, it is submitted that the preponderance of evidence in this matter was, as found by the ALJ, that Creasey did not control the maximum price that could be charged for products sold by the Lessees.

The standard of proof that must be applied in these matters is a preponderance of evidence, Lucker Sand & Gravel v. Industrial Comm., 82 Utah 188, 23 P. 2d 225 (1933); Parkinson v. Industrial Commission, 110 Utah 309, 172 P.2d 136 (1946), which must reach the elevated standard of being "substantial." McGuire v. Department of Employment Security, 101 Utah Adv Rep 62 (Utah App., Feb. 1989).

The two cases that must be looked to with respect to the question of a "contract of hire" or of "wages" , under the facts of this case are Fuller Brush, supra, and Singer Sewing Machine Co. v. Industrial Commission, 104 Utah 175, 134 P.2d 479 (1943). It is submitted that Fuller Brush is, factually, on all fours with the facts of the case now before the court, as was found by the ALJ.

In Singer, it is pointed out that the right to determine and fix the compensation of the worker is indictive

of the relationship between the worker and employer. See also: Harry L Young & Sons, Inc. v. Ashton, 538 P.2d 316 (Utah 1975)

In the instant case the evidence clearly showed that the amount of compensation earned by the Lessee directly hinged upon his abilities in selling his product; the hours he was willing to work; the number of stops that he was willing to make; and the prices that he charged for the product, which could be more than that recommended, or could be less, at the Lessee's discretion. While there were suggested ceilings and floors, these were advisory only and did not result in termination of the equipment lease.

In Fuller Brush, the Utah court laid out guide lines and definitions that have stood the test of time.

Justice Larson stated in the majority opinion that:

> "The essential elements of wages are that they form a direct obligation against the employer, in favor of the employee; that when the service is performed the compensation, if any, accrues and becomes payable regardless of the success or failure of the undertaking; that any profits or earnings over and above costs of the service accrues to the employer and any loss as a result of the undertaking or service must be borne by the employer." (p.204 of Pacific citation)

Under the facts of the case now before the Court the elements laid out in Fuller Brush cannot be met in finding that Steed was paid a wage.

Creasey was paid his lease rentals, up front, regardless of whether the Lessee sold anything at all. The

Lessee had the product, and he could do with it what he wanted, but Creasey did not take anything back and Creasey was paid, not on what the product sold for from the truck, but on what the Lessee paid Creasey, or others, for the product.

The "profits and earnings" over and above the cost spelled out by Fuller Brush, became the property of the Lessee and not of the alleged employer, Creasey. The Lessee could charge anything he wanted, but Creasey did not get the wind-fall of a higher than normal return on the sale of product.

If there was a loss from the non sale of perishables, that loss fell on the Lessee, (R-132) not Creasey. (R-293)

If product did not sell, the Lessee got nothing, but was in fact out his investment in his product. Creasey still got his lease payments on the truck.

Any credit advances to the customer were the sole responsibility of Lessee and the loss, or gain, was his. (R-133)

Justice Larson pointed out in Fuller Brush, that all of the elements pointed out in Creameries of America were lacking under the facts of Fuller Brush, and it is submitted that Fuller Brush and the case now before the Court are almost identical as to the methods employed by lessee in the sale of product and the commission sales persons selling brushes in Fuller Brush.

It is respectfully submitted that the ALJ was correct

in applying Fuller Brush, and it is respectfully submitted that the Board of Review was in error in applying Creameries of America, and rejecting the reasoning of Fuller Brush.

It is to be noted that under Utah Code Ann 35-4-22(j)(1) it must be found that the Claimant was in fact performing services for wages, or was under any contract of hire written or oral, express or implied with the alleged employer before a person is deemed to be an employee for unemployment compensation purposes.

The latter phrase "or was under any contract of hire written or oral, express or implied" was not found by the Board of Review. The Respondents have not asserted that such a relationship existed at time of the hearings in this matter, therefore, the Petitioner will not further address that question in this brief.

The Board of Review went into an extensive examination of what it thought the evidence showed with respect to whether or not "wages" were being paid.

It reached the conclusion that "wages" were in fact being paid by Creasey because Steed could not raise or increase the price of the product being sold.

This is in direct opposition to the reasoning and conclusions of law found by the ALJ (R-313, 314) and the facts adduced during the hearing.

As pointed out above, Steed could and did increase

prices, lower prices, give product away, and in short deal with the product as his own, to do with as he saw fit.

The Board's finding of fact that wages that were paid is reversible error.

POINT FOUR

ELEMENTS NECESSARY TO ESTABLISH EMPLOYMENT

The Board of Review relied heavily upon the case of Creameries of America, supra, in reaching its decision that Steed was an employee, and pointed out (R-295), that most of the elements of Creameries of America, were present in the instant case.

In the case of New Sleep, Inc., v. Department of Employment Sec., 703 P.2d 289, (Utah 1985) the Supreme Court laid down elements or factors which should be considered. However, not all need be present. Ellison, Inc. v. Board of Review, 749 P.2d 1280 (Utah App. 1988). Reaffirmed in McGuire v. Department of Employment Security, 101 Utah Adv Rep 62 (1989).

Utah has adopted the Restatement of Law, Agency, 1st and 2nd § 220 and the various factors spelled out in this work as those which are to be considered. in determining whether a person is an employee or not. Christean v. Industrial Commission, 113 Utah 451, 196 P.2d 502 (1948); Rustler Lodge v. Industrial Com'n, 562 P.2d 227 (Utah, 1977).

Various elements or factors will be discussed hereafter, which are not necessarily specifically those

pointed out in Creameries of America, or Fuller Brush.

PRODUCT HANDLED:

In Creameries of America the element of exclusivity of product was used as one of the factors in determining whether wages were being paid and thus the status of an employee existed.

The Review Board found that the Lessees from a practical matter were substantially limited in handling product other than that sold by the Company, because of the termination provision of the contract. (R-295) It is submitted that this was mere supposition on the part of the Board which ran directly contrary to the testimony of the witnesses, none of whom had been discharged for such practices.

The testimony in this matter showed that the Lessee could handle any product he wanted (Bowles R-171) Littlefield, R-224, 226) the only restriction being, however, that Creasey be paid 13% of the purchase price (R-224) of such product bought from others as part of the lease rental for the truck, which was admitted to be fair by the Lessees (R-130)

CONTROL OR RIGHT OF CONTROL:

Much time and many cases have turned upon the issue of control or the right of control in making a determination as to whether or not an individual is an employee under the statutory provisions of Utah Code Ann 35-4-22.

Many cases hold that the determinative factor is not "control" which establishes the differentiation between that of an independent contractor and employee but it is the "right of control" that governs. However, Utah cases still speak of control as being one of the factors that has to be considered.

The amount of control exercised must be "comparatively" high over the person performing the required duties. Harry L. Young & Sons, Inc. v. Ashton, 538 P.2d 316, 318 (Utah 1975).

While control or the right of control is one of the "most" important elements in determining the employee or independent contactor relationship, it cannot be used, seperate and apart from all of the other factors used to make that determination. Sutton v. Industrial Commission, 9 Utah 2d 309, 344 P.2d 538 (1959).

DESIRED RESULT:

One of the means of determining whether a person is an independent contractor or an employee is to apply a test to determine what the employer wishes to accomplish as opposed to the method or means that must be employed to reach that desired result. Thus, if the employer has the right to dictate the method and means by which the employee is to carry out his duties to reach the desired result, then he is an employee, but if the employer tells the person what the end result is to be after that person has performed his duties,

then he is an independent contractor. North American Bldrs, Inc. v. Unemployment Comp. D., 22 Utah 2d 338, 453 P.2d 142 (1969).

The Supreme Court in Parkinson v. Industrial Commission, 110 Utah 309, 172 P.2d 136 (1946) Stated:

> "Anyone employing an independent contractor, such as a plumber or a building contractor, has the right to determine where he wants the work to be done. It is when the employer can not only determine where the work shall be done, but how it should be executed that the relationship is that of employer-employee."

In the case now before the Court there was no evidence showing that Creasey dictated how the product was to be sold. There was nothing in the evidence that set quotas that the Lessees had to meet. The only thing that was shown was that the Lessees were to carry a minimum of product, but whether they sold it or not, was solely up to them. As Creasey was paid its lease rentals based upon product purchased for sale by the Lessees, Creasey was interested in the minimum amount of product purchased by the Lessee. But whether Lessee sold the product was of no moment to Creasey, as the responsibility to pay the lease rentals was incurred by the Lessee at the time that he acquired the product from Creasey.

The methods by which Lessees sold the product were theirs. Admittedly, Creasey would make suggestions as to marketing techniques, but these were not demands, but merely

suggestions.

HOURS:

This matter could be construed as part of control or right of control, but for the purposes of this brief it shall be addressed independently.

With respect to the number of hours that the Lessee worked, this was left solely up to each individual.

Bowles testified: (R-172-173)

> "Q. Do you control your own hours then in accordance with what you then percieve to be the needs of your customers?
>
> A. Yes.

McDermaid, one of the route supervisors, testified: (R-205)

> "Q. In your day-to-day supervision of the number of routes that you sort of have responsibilities for, sir, have you ever told a driver, a route licensee, what time he or she had to come to work?
>
> A. No.
>
> Q. Ever told them how many hours they had to work?
>
> A. No.
>
> Q. Ever told them what time they had to be back to Creasey Catering?
>
> A. No.

INTENT :

The Intent of the parties is one of the "most" important factors to be considered in determining the status of the parties. Christean v. Industrial Commission,

113 Utah 451, 196 P.2d 502 (1948); Sutton v. Industrial Commission, 9 Utah 2d 309, 344 P.2d 538 (1959); Rustler Lodge v. Industrial Com'n, 562 P.2d 227 (Utah 1977); Restatement of The Law, Agency, 2nd, § 220; Restatement of The Law, Agency, 1st, § 220.

The parties contracted with one another on the basis that the relationship was that of an independent contractor-employer basis (Exhibit 10, R-40, para 13).

Mr. Steed thought that he was an independent contractor for over 18 years, (R-145) as did the other witnesses who testified before the ALJ.

It is acknowledged that the written intent of the parties is ineffective to circumvent the unemployment compensation act if the actions of the individual brings himself under the act, Superior Cablevision v. Industrial Com'n, 688 P.2d 444, 447 (Utah 1984,) and cases cited therein, but the actions of Creasey have not brought it within the scope of the act.

CUSTOMERS:

The status of customers was explored in Creameries of America. It is submitted that there are few similiarities between the instant case and Creameries of America.

The testimony of the witnesses established that the customers were the customers of the individiual Lessee and that the Lessee could and did solicit new business. (R-93)

Drollinger, a witness for Steed testified:

"Q. Okay. And did you solicit customers?

A. Yes.

Q. Successfully?

A. Yes.

Q. Did you keep them yourself?

A. Yes.

Q. All of them?

A. Pretty well, I would say.

Q. Did you loose customers that had been on a route that you started to another driver?

A. Not without my okay on it.

(R-162)

BUSINESS LICENSE:

Under the present status of Utah cases this element would seem to have little real impact on the status of the individual anymore.

Steed denied having any business licenses after 1974 (R-128-129) or a tobacco license, although paragraph 13 of the License Agreement (Exhibit 10, R-40, para 13) required him to have one.

Bowles, a witness for Creasey testified that he had a Tobacco License for many years. (R-183)

Steed admitted having collected, under a sales tax license, Utah sales tax but gave that up when he fell behind and was caught by the State Tax Commission (R-111, 129), and from that point forward he allowed Creasey to collect and remit the sales tax for him. That was also true of the Steed's

only witness, Drollinger. (R-156)

In Barney v. Dept. of Employment Sec., 681 P. 2d 682 (Utah 1984), the Court said in the decision:

> "Nor does the existence of a license determine the independent nature of a trade, there being no evidence in this case of a distinction between a specialist who holds a license and one who does not."

In McGuire v. Department of Employment Security, 101 Utah Adv 62 (Utah App., Feb. 1989) the Court of Appeals pointed out that even having a license was not dispositive of the independent nature of a persons business.

SUBSTANTIAL INVESTMENT IN TOOLS OR EQUIPMENT NECESSARY TO DO THE WORK:

This factor is heavily stressed in the Restatement as well as in Creameries of America.

While it is true that the trucks belonged to Creasey it is also true that each truck was under a lease agreement to each of the Lessees, including Steed, and as such this constitutes a substantial investment in tools necessary to do the work. Lessee was required to invest in other tools such as a money changer and his inventory.

There is nothing in the law that requires one to own outright the tools of his trade. From a practical matter, many businesses as well as other independent contractors do not own their own tools outright, but lease them, or are buying them on time under a security agreement or mortgage.

The following matters are not directly pointed out as seperate elements but their impact must be considered in establishing the relationship between the parties.

SEPERATE BOOKS OF RECORD AND ACCOUNTS:

The Lessees kept their own books and records. (R-124)

ACCOUNT TO EMPLOYER FOR PROFITS AND LOSSES:

The Lessees kept their profits and were responsible for their own losses. (R-124, 134, 157) They did not account to Creasey.

ACCOUNT TO EMPLOYER FOR THE COST OF GAS, OIL AND OTHER EXPENSES OF THE LEASED TRUCK:

Under the facts of this case the Lessee was responsible to purchase the gas and oil, (R-123) and the cost was not borne by Creasey. (R-123) Lessee was responsible for the payment of the deductible physical vehicle damage.

SOLICITING NEW BUSINESS:

As previously pointed out above, the Lessee had the right to solicit new business.

CHARGING PRICES WITHOUT CREASEY'S CONSENT:

As previously pointed out above, the Lessee had the right to charge such prices as he wanted, although he was encouraged by Creasey to follow Creasey's lead as to a ceiling on pricing.

RISK OF LOSS:

The risk of loss to the Lessee occured, under the

facts of this case, when the Lessee purchased product as it became his product. (R-132)

EMPLOYMENT OF OTHER PERSONNEL BY LESSEE:

Under the facts of this case the Lessee had the right to perform the services under the contract in person or to employ others, at his own cost, to perform the services being rendered for him.

Steed's counsel stipulated that: (R-222)

> "And I think we can stipulate that there are employees of the drivers, whether they are loaders or other persons helping in the driver's task at Creasey, . . ."

Creasey's counsel then stated: (R-222)

> "I want there to be a clear showing on this record, and I assume we might accomplish that by stipulation, Mr. Wharton, that the route licensees are free to, and in many instances, do employ their own personnel, for whatever purpose.
>
> MR. WHARTON: Oh, I think we stipulate to that."

PAYMENT OF LESSEE FOR SERVICES RENDERED:

In the instant case, as has been shown above, the Lessee is not paid by Creasey but gained his income from sales to his customers. Fuller Brush, supra. This is a factor that must be looked at to determine the true status of the relationship between the parties. Harry L Young & Sons, Inc. v. Ashton, 538 P.2d 316 (Utah 1975).

TERMINATION RIGHTS:

In the instant case, either party had the right to terminate their association with one another without the incurring of any liability, except for any outstanding debts. This is another factor that has to be considered in determining the status of the parties. Harry L. Young & Sons v. Ashton, supra.

CONCLUSION

It is respectfully submitted that the question of whether Creasey met the AB test need not be addressed as the question of Steed being paid a "wage" is dispositive in this case.

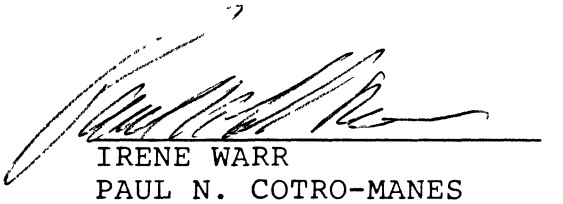
The Board of Review committed reversible error in ruling that the facts of the instant case brought it under Creameries of America instead of Fuller Brush.

To get the instant case under Creameries of America the Board of Review made an error of fact that the maximum amount that could be charged by Steed and the other Lessees was totally and completely controlled by Creasey, while the facts showed to the contrary.

While this is but one element which must be considered, it was the element upon which the Board of Review predicated its decision that Steed was in fact earning a wage, and thus an employee under the Unemployment Compensation Act of Utah.

It is respectfully submitted that the Administrative Law Judge correctly applied the facts and law in this case and his decision should be reaffirmed by the Court and the Board of Review's decision reversed.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

This is to certify that on the 2nd day of May, 1989 the undersigned caused to be served upon the Respondents, copies of the foregoing brief, by United States Mail, postage prepaid and addressed to:

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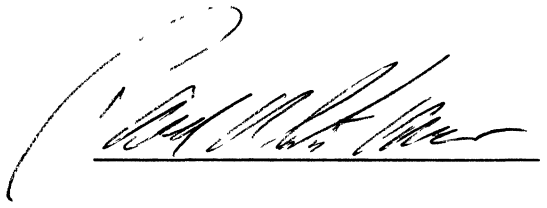

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of
ADDENDA

The following documents are attached hereto as Addenda to this Brief.

A. Utah Code Annotated, 35-4-22 (j) (1) and (5)

B. Restatement of the Law, Agency, § 220

Note: 1st Edition and 2nd Edition of Restatement are identical and Addendum is a photo reproduction of the 2nd Edition.

UTAH CODE
ANNOTATED

1953

VOLUME 4B

1988 REPLACEMENT

Titles 34 to 38

THE MICHIE COMPANY
Law Publishers
Charlottesville, Virginia

(1) All individuals performing services within this state for any employing unit which maintains two or more separate establishments within this state are considered to be performing services for a single employing unit for all the purposes of this chapter.

(2) Each individual employed to perform or to assist in performing the work of any person in the service of an employing unit is considered to be engaged by the employing unit for all the purposes of this chapter whether the individual was hired or paid directly by the employing unit or by the person, provided the employing unit had actual or constructive knowledge of the work.

(3) "Hospital" means an institution which is licensed, certified, or approved by the Department of Health as a hospital.

(4) (A) "Institution of higher education," for the purposes of this section, means an educational institution which:

(i) admits, as regular students only, individuals having a certificate of graduation from a high school, or the recognized equivalent of a certificate;

(ii) is legally authorized in this state to provide a program of education beyond high school;

(iii) provides an educational program for which it awards a bachelor's or higher degree, or provides a program which is acceptable for full credit toward that degree, a program of postgraduate or post-doctoral studies, or a program of training to prepare students for gainful employment in a recognized occupation; and

(iv) is a public or other nonprofit institution.

(B) All colleges and universities in this state are institutions of higher education for purposes of this section.

(i) "Employer" means:

(1) Any employing unit which paid wages during a calendar quarter in either the current or preceding calendar year for employment amounting to $140 or more and any employing unit subject to the Federal Unemployment Tax Act, or which, as a condition for approval of this chapter for full tax credit against the tax imposed by the Federal Unemployment Tax Act, is required, under the act, to be an employer.

(2) Any employing unit which, having become an employer under Subsection (1), has not, under Sections 35-4-5 and 35-4-8, ceased to be an employer subject to this chapter; or,

(3) For the effective period of its election under Subsection 35-4-8(c) any other employing unit which has elected to become fully subject to this chapter.

(j) (1) "Employment" means any service performed prior to January 1, 1972, which was employment as defined in the Utah Unemployment Compensation Law prior to the effective date of this chapter, and subject to the other provisions of this subsection, service performed after December 31, 1971, including service in interstate commerce, and service as an officer of a corporation performed for wages or under any contract of hire written or oral, express or implied.

(2) "Employment" includes an individual's entire service performed within or both within and without this state if any of the following Subparagraphs (A) through (K) is satisfied:

(A) the service is performed entirely within the state; or

(B) the service is performed both within and without the state, but the service performed without the state is incidental to the individual's service within the state, for example, is temporary or transitory in nature or consists of isolated transactions.

(5) Services performed by an individual for wages or under any contract of hire, written or oral, express or implied, are considered to be employment subject to this chapter, unless it is shown to the satisfaction of the commission that:

(A) the individual has been and will continue to be free from control or direction over the performance of those services, both under his contract of hire and in fact; and

(B) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the contract of service.

(6) Provided that the services are also exempted under the Federal Unemployment Tax Act, as amended, "employment" shall not include:

(A) service performed:

(i) prior to January 1, 1973, in the employ of a state, except as provided in Subsection 35-4-22(j)(2)(D); or

(ii) in the employ of a political subdivision of a state, except as provided in Subsection 35-4-22(j)(2)(D);

(B) service performed in the employ of the United States Government or an instrumentality of the United States immune under the Constitution of the United States from the contributions imposed by this chapter, except that, to the extent that the Congress of the United States shall permit, this chapter shall apply to those instrumentalities and to services performed for the instrumentalities to the same extent as to all other employers, employing units, individuals and services; provided, that if this state is not certified for any year by the secretary of labor under Section 3304 of the Federal Internal Revenue Code, the payments required of the instrumentalities with respect to that year shall be refunded by the commission from the fund in the same manner and within the same period as is provided in Subsection 35-4-7(d) with respect to contributions erroneously collected;

(C) service performed after June 30, 1939, as an employee representative as defined in the Railroad Unemployment Insurance Act (52 Stat. 1094), and service performed after June 30, 1939, for an employer as defined in that act except that if the commission determines that any employing unit which is principally engaged in activities not included in those definitions constitutes such an employer only to the extent of an identifiable and separable portion of its activities, this exemption applies only to services performed for the identifiable and separable portion of its activities;

(D) agricultural labor as defined in Subparagraph (8) of this subsection, except as provided in Subsection 35-4-22(j)(2)(J);

(E) domestic service in a private home, local college club, or local chapter of a college fraternity or sorority, except as provided in Subsection 35-4-22(j)(2)(K);

AGENCY 2d

Volume 1

§§ 1–283

As Adopted and Promulgated

BY THE

AMERICAN LAW INSTITUTE

AT WASHINGTON, D. C.

May 23, 1957

WHO IS A SERVANT

§ 220. Definition of Servant

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.